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Nos. 93-1456 and 93-1828

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, *et al.*,
Petitioners,

v.

RAY THORNTON, *et al.*,
Respondents,

STATE OF ARKANSAS ex rel. WINSTON BRYANT,
Attorney General of the State of Arkansas,
Petitioner,

v.

BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

REPLY BRIEF FOR THE STATE PETITIONER

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REPLY BRIEF FOR THE STATE PETITIONER

Respondents [1] and their amici misread the provision of Amendment 73 before the Court and treat it as if it imposed an absolute bar to continued officeholding by congressional incumbents. Respondents' and amici's par-

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[1] We use the term "respondents" to refer to those respondents supporting the judgment below.

allel arguments run as follows: The Qualifications Clauses bar the States from limiting the terms of Representatives and Senators; Amendment 73, despite its clear text, is not materially different from a term limit; Amendment 73 therefore is invalid under the Qualifications Clauses. That is so, they contend, even though Amendment 73 permits a long-term incumbent to be elected as a write-in candidate.

The principal flaw in respondents' and amici's position is their attempt to elide the difference between a term limit and a ballot access restriction, or, put another way, their failure to articulate the difference between a regulation of the federal electoral process and a qualification to hold federal office. That distinction is necessary to any proper analysis of the issues presented by this case, since the Elections and Qualifications Clauses must be read in a manner to accommodate each other. Indeed, that distinction is critical to respondents' and amici's submission, because they would permit States to regulate federal elections as long as a restriction does not become a qualification. Since they do not define a line separating regulations from qualifications, their arguments read like Hamlet without the Prince of Denmark.

By contrast, our interpretation of Article I defines both terms. As we explained in our opening brief, State Br. 28-31, 35, and Representative Dickey *et al.*, explained in theirs, Dickey Br. 11-24, a regulation does not constitute a "qualification" unless it bars a candidate victorious at the polls from holding office as a matter of law. The First, Ninth, and Eleventh Circuits have each endorsed that standard, and we submit that it is the correct one, for several reasons. That standard is identical to dictionary interpretations of the term "qualification" written contemporaneously with the passage of Article I; it is the interpretation that the Framers would have given to the term "qualification," because it is consistent with the use of numerous 18th century voting requirements,

such as property ownership; it is the stated understanding of that term expressed in contemporary publications authored by influential figures such as William Blackstone, James Madison, and Alexander Hamilton, and in the treatise written later by Justice Joseph Story; it is the characterization that this Court gave to that term in decisions such as *Powell v. McCormack*, 395 U.S. 486, 522, 533, 547 (1969), and *Storer v. Brown*, 415 U.S. 724, 746 n.16 (1974); and it permits that term "qualification" to serve as a fit subject for judicial review, because it provides a judicially manageable standard to assess electoral laws. That standard, when applied to this case, shows that Amendment 73 is not a "qualification," because Amendment 73 does not exclude long-term incumbents from office as a matter of law. Accordingly, if this Court agrees with our definition of the term "qualification," the judgment below should be reversed.

By ignoring the actual text and operation of Amendment 73, respondents and amici have failed to address the question at hand: namely, whether the people of a State can attempt to offset the numerous varied advantages of long-term incumbency by making it easier for a voter to cast a ballot for a challenger. The procedure places no greater burden on a long-term incumbent than the one borne by every candidate for the first century of this Nation's existence—convincing voters to write in the incumbent's name for office. As we explained in our opening brief, State Br. 31-33, write-in procedures were used in voting for more than 100 years in this country, and Arkansas constitutionally could use that procedure today in lieu of polling booths for every federal election. Neither respondents nor their amici argue to the contrary. The result is this: Amendment 73 requires resort to a plainly constitutional voting procedure for a limited category of individuals—long-term incumbents—who, by definition, have proved their ability to attract voting support and are not entitled to special protection from the majoritarian political process. The question

here, accordingly, ultimately becomes whether *that* difference in the treatment afforded long-term incumbents violates the text of Article I. And it is with that question in mind that we reply to respondents' and their amici's specific arguments.

I. AMENDMENT 73 IS A LAWFUL BALLOT ACCESS RESTRICTION

A. Respondent Thornton and the Solicitor General maintain that Amendment 73 should be treated as a strict term limitation because its purpose and effect is to unseat long-term incumbents. In their view, the people of a State cannot impose a term limit on their own representatives in Congress. Because the ballot access restrictions of Amendment 73 were designed for the same purpose, and inevitably will have the same effect, as a term limit, they argue, Amendment 73 also is unconstitutional. Since there is no material difference between exclusion from office and exclusion from the ballot, they maintain, Amendment 73 is invalid. Thornton Br. 37-44; U.S. Br. 23-25. That argument is flawed in several respects.

1. We agree that, as a factual matter, the purpose of Amendment 73 (to put it accurately) is to increase the likelihood of rotation in office because of the harms that entrenched incumbency can wreak on the political process. Ark. Const. Amend. 73 Preamble, *quoted at* State Br. 4a; State Br. 4, 26-27. But that intent hardly renders Amendment 73 invalid.

The intent animating government action generally is irrelevant for Article I purposes. Good intentions do not justify exceeding constitutional limitations, and bad intentions do not invariably translate into a trespass on constitutionally-protected freedoms. The Equal Protection Clause is the principal exception to that general rule. It renders invalid otherwise permissible state action undertaken with (for example) racially discriminatory intent, because that provision seeks to eliminate racism, a state of mind, from

government activity. Accordingly, it is not surprising for the Equal Protection Clause to be concerned with the purpose for government action, including legislation. See *Hunter* v. *Underwood*, 471 U.S. 222 (1985). But legislative intent should be irrelevant for purposes of the Qualifications Clauses, just as it is irrelevant to the Ex Post Facto Clauses. On the one hand, if the Clauses define only the minimum qualifications for federal office, as we have argued, the States can add new ones, thereby excluding some additional candidates. If so, the purpose for unseating such candidates is immaterial. On the other hand, if the Clauses define the exclusive qualifications for federal office, the only pertinent question is whether *in fact* a law prevents a candidate from holding office. In that case, too, the purpose for such a law is irrelevant.[2] The intent of Amendment 73 thus should be immaterial to its constitutionality, under our theory or respondents'.

To be sure, legislative intent is relevant for purposes of determining whether Amendment 73 violates the First and Fourteenth Amendments. In that context, ballot access restrictions must, inter alia, promote a legitimate government interest, see *Burdick* v. *Takushi*, 112 S. Ct. 2059, 2063 (1992); *Anderson* v. *Celebrezze*, 460 U.S. 780, 789 (1983). and legislative purpose is relevant in that regard. Amendment 73 easily passes that test. As we noted in our opening brief, State Br. 18-27, 33-34 n.38, and Congressmen Dickey and Hutchinson detailed, Dickey Br. 24-36, Amendment 73 seeks to offset the numerous unfair advantages enjoyed by long-term incumbents in order to increase

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[2] For example, under our submission a statute requiring write-in voting for *all* candidates does not impose a qualification for federal office, even if the legislature's avowed purpose was to make re-election difficult for long-term incumbents, since a uniform write-in procedure excludes no one from office. Moreover, under respondent's theory a law barring prisoners from serving in Congress would be unconstitutional, even though the purpose of the law was to ensure that whoever was elected actually could attend sessions in Washington, D.C.

the competitiveness of elections and, ultimately, help assure the benefits of representative government through more frequent rotation of officeholders. History shows that rotation in office has long been a desirable way to achieve a vibrant democracy, State Br. 21-27, and this Court's decisions show that States have a compelling interest in assuring that elections remain open, competitive, and fair. Dickey Br. 33. Indeed, this Court already has held that States may impose term limits on state officers, see *Maloney v. McCartney*, 223 S.E.2d 607 (W. Va.), appeal dismissed for want of a substantial federal question *sub nom. Moore v. McCartney*, 425 U.S. 946 (1976) (upholding two-term limit for governor), and the reasons why States may adopt such laws apply in this context, too. Accordingly, to the extent that the purpose of Amendment 73 is relevant to its constitutionality, that inquiry is required only by the First and Fourteenth Amendments, not the Qualifications Clauses. In any event, Amendment 73 passes that test with flying colors.

There is utterly no merit to the Solicitor General's offensive implication that Amendment 73 resembles the type of racially-motivated legislation considered in cases like *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), which involved racially-motivated gerrymandering, and *Guinn v. United States*, 238 U.S. 347 (1915), which involved a "grandfather clause" exemption from a literacy test requirement for voting. In those cases, the States sought to dress racially-discriminatory actions in racially-neutral clothing by raising justifications for their laws that upon close examination proved to be a sham. In this case, by contrast, the people of Arkansas purposefully sought to increase rotation in office to achieve its benefits while steering clear of the Qualifications Clauses. In a compromise that would have been well recived by the Framers, who themselves were the "masters of compromise," *United States Dep't of Commerce v. Montana*, 112 S. Ct. 1415, 1429 (1992), the people of Arkansas tried to achieve the benefits of rotation without foreclosing anyone from holding office if the voters so desired. Amendment 73

may not be constitutional (although we believe that it is), but it certainly is not even remotely pretextual.[3]

2. Respondents and amici also err in asserting that Amendment 73 inevitably will lead to the defeat of long-term incumbents. Although we hope that Amendment 73 will have that effect, only time will tell. After all, Amendment 73 excludes from the ballot only candidates with a proven ability to win elections. Perhaps they will prevail despite Amendment 73; perhaps not. Oftentimes, experience is worth more than logic, *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921); O. W. Holmes, *The Common Law* 5 (1881), and this case is no exception. The disadvantages felt by challengers or small, third-party candidates who are excluded from the ballot, see, *e.g.*, U.S. Br. 24, hardly apply to long-term incumbents, particularly in a State like Arkansas, where the voters are overwhelmingly registered for one party. And it is naive (at best) to claim that Arkansas voters would not have known that Senators J. William Fullbright and John McClellan lacked the "endorsement" and "support" of the Democratic Party even if they had been excluded from the ballot due to Amendment 73. *Id.*[4] Even today's

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[3] Indeed, one of the benefits of increasing rotation in office would be an enhanced possibility for women and minorities to serve in office. See *United States v. City of Houston*, 800 F. Supp. 504, 507 (S.D. Tex. 1992) (before it required a special election, the Justice Department should have considered city council term limits approved by voters as an effective means of increasing minority opportunities). Historically, virtually all of the women and minorities who have been elected to either the House or the Senate were first elected in open seats. See *Politics in America, 1994: 103d Congress* (P. Duncan ed. 1993); *Women in the United States Senate*, Senate Historical Office (from U.S. Congress, *Women in Congress*, H.R. Doc. No. 238, 101st Cong. 2d Sess. (1991)).

[4] Amici California Democratic Party *et al.* argue that laws like Amendment 73 violate the First and Fourteenth Amendments by preventing political parties from nominating a candidate. California Dem. Party Br. 12-28. Amendment 73, however, applies only to the general election; it does not prevent any party from nominating

incumbents have publically-funded media facilities and heightened name recognition, *e.g.*, 2 U.S.C. §§ 123b, 123b-1 (West Supp. 1994); State Br. 26; U.S. Term Limits Br. 19-20 & n.25; State of Washington Br. app. A1-A15, which offset the burden of having to persuade voters to write in their names. The upshot is that experience under Amendment 73 may reveal that long-term incumbents are re-elected nonetheless. Since that may turn out to be the case, it is wrong to maintain that Amendment 73 necessarily will have the same effect as a term limit.

Respondents also rely on the Arkansas Supreme Court's statement that write-in candidates have only a "glimmer[] of opportunity" to succeed, claiming that this statement constitutes a factual finding that supports their submission. Pet. App. 15a.[6] The statement, however, is a ruling of law, not a factual finding. To support that statement, the Arkansas Supreme Court cited a federal district court decision on summary judgment in another case, *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994), appeals pending *sub nom. Thorsted v. Munro,* Nos. 94-35222 *et al.* (9th Cir.), cert. before judgment denied *sub nom. Citizens For Term Limits v. Foley*, 114 S. Ct. 2727 (1994), not the record in this case, Pet. App. 15a, which, as U.S. Term Limits has shown, would not support any such factual finding, U.S. Term Limits Br. 17-25. And the district court in *Thorsted* committed the same mistake as the court below, relying on this Court's statements, made in the very different context of third-party candidates, that exclusion from the ballot effectively excludes

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any candidate in the primary process or from endorsing one at the general election.

[6] Respondent Thornton also argues that this factual finding is not subject to review by this Court, Thornton Br. 40, but that claim is meritless. This Court has the power to review state court factual findings made in connection with constitutional issues. *Hernandez v. New York*, 111 S. Ct. 1859, 1869-71 (1991) (plurality opinion) (collecting cases).

one from office. As we have shown, that prediction cannot be made in this case. In any event, this Court sustained a ballot access regulation in *Storer*, 415 U.S. at 746 n.16, even though it excluded a person from the ballot for federal office. *Storer* thus proves that an otherwise valid ballot-access regulation is not rendered unconstitutional simply because it has an exclusionary effect.

B. Respondents Hill *et al.*, criticize Amendment 73 on the ground that it violates "the *Powell* principle," Hill Br. 31, which they describe, quoting Alexander Hamilton, as the tenet that "the people should choose whom they please to govern them," Hill Br. 9 (quoting *Powell*, 395 U.S. at 547; citation and internal punctuation omitted). See Hill Br. 32 (quoting James Madison for the proposition that "the door to service in Congress was to be open to merit of every description" and "[n]o qualification of wealth, of birth, of religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people"). Hamilton's and Madison's statements, however, only reveal that the Constitution itself does not bar individuals from holding office. Those statements do not show that the States could not add additional qualifications, and they have not been so construed. Congress and the States, for instance, have barred felons from holding state and federal offices since 1661, State Br. 9 & n.5, 43 & n.46; U.S. Term Limits Br. 25-31, and Thomas Jefferson believed that the States retained that authority by virtue of the Tenth Amendment, State Br. 15. It also is unfair to Hamilton and Madison to read their remarks literally. There were numerous contempory instances in which "qualification[s] of wealth * * * [or] birth" *did* exclude a sizeable number of people. *E.g.*, *The Anti-Federalist Papers and the Constitutional Convention Debates* 9 (Ralph Ketcham ed. 1986) ("property qualifications for voting and office-holding were common, and women were barred from doing either"); State Br.

42.[6] Hamilton and Madison doubtless were aware of that fact; perhaps they, like Homer, nodded. Cf. *Lee v. Weisman*, 112 S. Ct. 2649, 2674 n.5 (1992) (Souter, J., concurring). A better construction of their statements, however, is that the federal Constitution did not bar such individuals from federal office, rather than that the Constitution guaranteed everyone but those specifically excluded the opportunity to hold federal office.

Despite the respondents' dissatisfaction with Amendment 73, it reflects the choice of the people of Arkansas.

[6] See also, *e.g.*, Donald W. Rogers, *Voting and the Spirit of American Democracy* 3, 5, 6, 21 ("[a] second major qualification [beyond being an adult white male] is that in some colonies, a two-tier system of elections—with more property required for voting for higher offices—separated local contests from colony-wide contests"[; *e.g.*, State Br. 21b-22b]), 22 ("Women did not vote, could not be voters, could not hold office and only very, very rarely participated in politics at all.") (footnote omitted), 24 ("all the colonies restricted voting to Protestant Christians"), 24 ("I have included the word white out of convention. Few colonies legislated American Indians or Negroes out of the suffrage. Nevertheless, no instances of blacks or Indians voting have been discovered in the northern colonies, and one would assume that convention kept them from the polls. It is clear, however, that Negroes did vote in Virginia, North and South Carolina, but in those places, as well as in Georgia, laws essentially forbade the practice.") (footnote omitted), 26 ("Efforts to include blacks and women [as voters] got nowhere before the Civil War, and indeed it was not until Wyoming was admitted to the Union in 1890 with female suffrage that the women's suffrage movement had any success at all.") (footnote omitted) (1992); 1 *Colony Laws of Virginia, 1619-1660*, at xix-xx (John D. Cushing ed. 1978); James H. Kettner, *The Development of American Citizenship, 1608-1870*, at 215-19 (1978). Because neither women nor blacks were permitted to vote, there were no women or black members of Congress. See, *e.g.*, Mildred L. Ames, *Black Members of the United States Congress, 1789-1991* (CRS Report May 10, 1991); Mildred L. Ames, *Women in the United States Congress* (CRS Report July 6, 1993). The fact that Article I of the Constitution has never specifically forbidden the election of women and blacks to Congress does not obviate the reality that those classes of citizens were ineligible to be elected to Congress, were not elected and did not serve until the pertinent state laws were changed or superseded.

The people have chosen who will govern them—and for how long. Thus, the enterprise begun by Hamilton and Madison continues to allow the people to choose.

C. Finally, respondents Hill *et al.* argue that Amendment 73 cannot be defended as a ballot access regulation, because a state cannot exclude from the ballot a candidate who satisfies the necessary qualifications. Hill Br. 32-40. None of the reasons given by respondents, however, is persuasive.

For instance, respondents argue that the Elections Clause authorizes the State to regulate only procedural aspects of federal elections, not the substantive electoral criteria. Hill Br. 33, 35. Yet, "the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn." *Sun Oil v. Wortman*, 486 U.S. 717, 726 (1988). That maxim applies in this case, too. This Court in *Storer* upheld a state law excluding from the ballot as an independent candidate anyone who lost in the primary or was registered in a political party, and the Court in *Burdick* sustained a state law that altogether prohibited write-in votes. Both laws were substantive regulations of the electoral process. Respondents maintain that if States can exclude otherwise qualified candidates from the ballot, States can "circumvent the entire notion of a Congress 'open to merit of every description.'" Hill Br. 33. That "notion" is more fiction than fact, however, as we have shown above. Respondents assert that no decision supports our interpretation of the Elections Clause. Hill Br. 35. But *Storer* and *Burdick* do support our submission.

II. AMENDMENT 73 ALSO IS LAWFUL EVEN IF IT IS DEEMED A TERM LIMIT

A. We argued in our opening brief that the text of the Constitution itself shows that the Qualifications Clauses are not exclusive, for several reasons. State Br. 36-39. *First*, the most natural reading of their text is

that they set minimum, not maximum, requirements. *Second*, the Framers knew how to draft a provision that established "uniform" or "exclusive" requirements, because the Framers used those terms elsewhere in Article I. See Art. I, § 8, Cls. 1, 4, and 17. *Third*, the Qualifications Clauses need not be read as uniform in order to be internally coherent, since the clauses refer to citizenship and inhabitancy, concepts that were defined by state law in 1789. *Fourth*, related constitutional provisions, such as the Incompatibility Clause, Oath or Affirmation Clause, and Religious Test Clause, show that the Qualifications Clauses are not exclusive, since those companion provisions also deal with this subject. *Fifth*, other provisions of Article I, such as the Ex Post Facto Clause, Bill of Attainder Clause, and Contract Clause, § 10, Cls. 1-3, show that the Framers knew how expressly to bar the States from enacting certain types of legislation, since those provisions *in haec verba* state that "[n]o State shall" undertake certain actions, including the "pass[age]" of specific laws. *Sixth*, the Tenth Amendment requires that doubts as to whether States have particular types of authority should be resolved in the States' favor. Those various propositions, each of which rests on the text of the Constitution, provide a compelling case that States can impose additional qualifications on federal officeholders.

Respondents Hill *et al.* and the Solicitor General do not discuss the constitutional text at all. Hill Br. 6-27; U.S. Br. 6-16. Respondent Thornton does, but he gets it backwards. In his view, Article I comprehensively regulates the federal electoral process, "pre-empt[ing]" States from supplementing that process through additional qualifications absent an "express delegation of authority" to do so. Thornton Br. 11.[7] The Framers, however, had

[7] The Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), does not support respondent Thornton's argument. See Thornton Br. 10. The Court in *Chadha* made the point (quoted by Thornton) that the bicameralism and presentment requirements of Article I were not merely "an abstract generalization." 462 U.S. at 436. *Chadha* did not involve the Qualifications Clauses.

a quite different view of how the Tenth Amendment works. See *The Federalist* No. 4, at 292-93 (J. Madison) (C. Rossiter ed. 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); James Wilson's Speech at a Public Meeting (Oct. 6, 1787), *reprinted at* 1 Bernard Bailyn, *The Debate on the Constitution* 64 (1993) ("every thing which is not given, is reserved"). Respondent's theory confuses statutory preemption doctrine with the Tenth Amendment. Compare, *e.g.*, *Rice v. Sante Fe Elevator*, 331 U.S. 218, 230 (1947), with, *e.g.*, *New York v. United States*, 112 S. Ct. 2408, 2417 (1992). It is the Tenth Amendment that provides the rule of decision here, and it preserves to the States powers not granted to the federal government nor denied to the States. Accordingly, there is no merit to respondent Thornton's argument that Article I implicitly bars the States from doing what they are not, and were never, explicitly prohibited from doing.[8]

B. Respondents and amici rely heavily on various statements made contemporaneously with the drafting and enactment of the Constitution to support their claim that the Qualifications Clauses are exclusive. Thornton Br. 12-34; Hill Br. 11-18, 21-22; U.S. Br. 7-15; Hyde Br. 4-25.[9] The Court noted in *Powell*, however, that those

[8] What is more, if the Constitution pre-empts supplemental State regulation, however, it also pre-empts supplemental federal regulation. There is no reason to distinguish the federal and state governments in this regard, and respondent Thornton offers none. But if that is so, then Congress cannot require that House elections be held by district, rather than at-large, 2 U.S.C. § 2(c) (1988), since Article I does not "express[ly] delegat[e that] authority" to the federal government.

[9] In that regard, respondents Hill *et al.* and amicus Hyde rely on the John Wilkes episode in England as authority for the proposi-

materials do not answer this question, explaining that "the debates are subject to other interpretations." 395 U.S. at 532 (footnote omitted).[10] What is more, as we already explained, State Br. 13-14, 43, Congress and the States began to adopt qualifications for federal officeholders shortly after the Constitution became law. Those actions demonstrate that the Framers and their contemporaries saw no constitutional infirmity in federal and State-imposed qualifications atop the ones specified in Article I.

But respondents' and amici's claim also is unpersuasive in its own terms. Neither respondents nor their amici cite a single statement by anyone present at the Constitutional Convention or state ratifying conventions, or writing contemporaneously with those events, that States were prohibited from imposing term limits on federal officers. That silence is particularly significant in light of two facts: (a) States clearly have, and frequently had exercised, the power to impose, for example, property qualifications on state officeholders, see State Br. App. 1b-34b, and (b) critics of the Convention's handiwork advanced

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tion that voters must be left free to elect whomever they wish. Hill Br. 8, 12; Hyde Br. 4-6. The Wilkes case, however, is irrelevant. Wilkes was expelled from (and declared ineligible for later membership in) Parliament for criticizing a peace treaty with France, resolutions later expunged. *Powell*, 395 U.S. at 527-31. The lesson that the Framers would have taken from the Wilkes affair, according to *Powell*, was that the power to judge qualifications did not include "the right to exclude members-elect for general misconduct not within *standing qualifications*." *Id.* at 528 (emphasis added). In other words, each House could not expel an otherwise qualified Member unless he violated a rule set forth in positive law. But term limits would be "standing qualifications" as this Court used that phrase in *Powell*, so Wilkes' case offers no support for the ruling below.

[10] For a response to the argument that Hamilton's views reflect the Framers' general understanding of the Qualifications Clauses, see Mark P. Petracca, *Restoring "The University in Rotation": An Essay in Defense of Term Limitation*, in *The Politics and Law of Term Limits* 57 (Edward H. Crane & Roger Pilon eds. 1994).

every conceivable argument in opposition to the Constitution. If Article I left the people of the States bereft of the power to set qualifications for their new delegates, such as excluding felons and the mentally incompetent, someone would have noticed it. No one did, since Article I did not have that effect. Under these circumstances, the Framers' silence alone is quite significant. Cf. *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.") (quoting *Harrison v. PPG Indus.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)).

C. Respondents and amici claim that *Powell v. McCormack*, 395 U.S. 486 (1969), prohibits States from adopting term limits. As we have explained, however, State Br. 44-45, the holding in *Powell* does not reach this case. The Court's lengthy discussion in *Powell* of justiciability dealt with the same danger raised by the Wilkes case: the refusal of a democratic body to seat a duly elected member. The Framers and the Court in *Powell* had in mind the fear that an elite institution would exclude popularly elected non-conformists. To avoid that possibility, the Court recognized that the power to judge qualifications must be circumscribed by well-defined criteria existing as positive law, lest the two-thirds expulsion power become superfluous. 395 U.S. at 547-49. The power of Arkansas' citizens to choose who is qualified to represent them as duly elected members of Congress poses no danger that cannot be remedied by the First and Fourteenth Amendments in justiciable cases.

The statements cited by respondents and amici from the Court's decision in *Powell* must be read in the factual context presented by that case, which included the fact that Mr. Powell was qualified under federal and state law to

hold his seat in the House.[11] Respondents Hill *et al.* claim that *Powell* endorsed the "principle" that the people should be free to elect whomever they choose. Hill Br. 9, 31-33. Yet, respondents reify the principles underlying that decision to a level far above what was necessary to decide that case. In that respect, the problem with "principles" is akin to the problem with "spirits": *viz.*, "they tend to reflect less the views of the world whence they come than the views of those who seek their advice." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring in the judgment).

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed.

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[11] See, *e.g.*, *Kokkonen v. Guardian Life Ins.*, 114 S. Ct. 1673, 1676 (1994) ("[i]t is to the holdings of our cases, rather than their dicta, that we must attend"); *Air Courier Conference v. United Postal Workers Union*, 498 U.S. 517, 529 (1991) ("This statement, like all others made in our opinions, must be taken in the context in which it was made.").